Supreme Court
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No.

IN THE

Supreme Court of the United States

THOMAS RIDGE, GOVERNOR OF THE COMMONWEALTH OF PENNSYLVANIA, ET AL.,
Petitioners,

v.

DAVID POWELL, ET AL.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the United States Department of Education exceed its rule making authority under Section 602 of Title VI of the Civil Rights Act of 1964 and create substantive federal law, where, under the guise of effectuating Section 601 of the Act, which prohibits only intentional discrimination, it promulgated a regulation purportedly limiting the discretion of federally-funded state agencies when their actions allegedly result in a discriminatory effect upon minorities?

2. Did Congress intend to create a private right of action to enforce a generally worded regulation promulgated by the Department of Education under Section 602 of Title VI of the Civil Rights Act of 1964 that prohibits federally-funded state agencies from utilizing criteria or methods of administration which have a discriminatory effect on minorities?

3. Can a generally worded regulation promulgated by the United States Department of Education — which regulation prohibits recipients of federal funds from utilizing criteria or methods of administration that have the effect of defeating or substantially impairing accomplishment of the objectives of a program protecting individuals of a particular race, color, or national origin — support a broad-based attack upon state legislation establishing a system for funding public education in the state?

LIST OF PARTIES

Petitioners are Thomas J. Ridge, Governor of the Commonwealth of Pennsylvania; James P. Gallagher, Chairperson of the Commonwealth of Pennsylvania State Board of Education; Eugene Hickok, Pennsylvania Secretary of Education; and Barbara Hafer, Treasurer of the Commonwealth of Pennsylvania.

Defendant intervenors in the district court below are State Representative Matthew J. Ryan, State Senator Robert C. Jubelirer, State Representative Jess M. Stairs, and State Senator James J. Rhoades.

Respondents are David Powell; Shelean Parks; Patrice Everage; Julia A. Davis; Yvette Bland; Geraldine Newton; Maria M. Rivera; Mary E. Miller; Gregory Luzak; Catherine Luzak; Fu Zhen Xie; The Black Clergy of Philadelphia and Vicinity; Philadelphia Branch of NAACP; Aspira, Inc. of Pennsylvania; Parents Union For Public Schools; Citizens Committee On Public Education In Philadelphia; Parents United For Better Schools, Inc.; David W. Hornbeck, Superintendent, The School District Of Philadelphia; Floyd W. Alston, President, Board of Education of The School District of Philadelphia; Board of Education of The School District of Philadelphia; The School District of Philadelphia; Edward G. Rendell, Mayor, City of Philadelphia; and the City of Philadelphia.

Plaintiff intervenors in the district court below are Philadelphia Federation of Teachers Local 3 and Ted Kirsch, President, Guardian Ad Litem.

There are no parent companies or subsidiaries of any party known to Petitioners.

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Petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit, which reversed the final judgment of the United States District Court for the Eastern District of Pennsylvania dismissing this action with prejudice.

OPINIONS BELOW

The opinion and order of the Court of Appeals for the Third Circuit are not yet reported in the Federal Reporter (Third). They are unofficially reported at *Powell v. Ridge*, Nos. 98-2096, 98-2157, 1999 WL 643364 (3d Cir. August 25, 1999). The opinion and order are reprinted in Appendix A.

The memorandum opinion and order of the United States District Court for the Eastern District of Pennsylvania, issued November 18, 1999, are not reported in the Federal Supplement (Second). They are unofficially reported at *Powell v. Ridge*, No. 98cv01223, 1998 WL 804727 (E.D.Pa. Nov. 18, 1998). The memorandum opinion and order are reprinted in Appendix B.

STATEMENT OF JURISDICTION

The judgment and order of the United States Court of Appeals for the Third Circuit were filed on August 25, 1999, and this petition for writ of certiorari has been filed within ninety days of that date. This Court has jurisdiction to review the decision of the Third Circuit pursuant to 28 U.S.C. § 1254 (1994).

Petitioners are not challenging the constitutionality of any statute.

RELEVANT STATUTES AND REGULATIONS

The relevant United States statutory provisions are Sections 601 and 602 of Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d and 2000d-1 (1994). These provisions are reprinted in Appendix C.

The relevant federal regulatory provision is 34 C.F.R. §100.3(b) (1999). This provision is reprinted in Appendix D.

The relevant Pennsylvania statutory provisions are found in 24 P.S. §§ 6-601 to 6-695 (giving local governments authority to impose taxes for public education); and §§ 25-2502 to 25-2502.35, 25-2509.1, 25-2509.3, 25-2509.5, 8329 and 8535 (pertinent Commonwealth public school funding statutes) (West 1992 and West Supp.1999). These provisions are reprinted in Appendix E.

The relevant state regulatory provision is found in 351 Pa. Code 12.12-100 (1999) (creating the School District of Philadelphia). This provision is reprinted in Appendix F.

The relevant municipal codes are found in Philadelphia Municipal Code §§ 19-1801, 1804-1806 (authorizing School District of Philadelphia to levy special taxes for public education). These provisions are reprinted in Appendix G.

STATEMENT OF THE CASE

Background

The questions presented in this petition are familiar to this Court but have not yet been decided by it. Before plaintiffs filed their complaint in this case, the Court of Appeals for the Third Circuit held in another case that "a private right of action exists under discriminatory effect regulations promulgated by federal administrative agencies pursuant to section 602 of Title VI of the Civil Rights Act of 1964." *Chester Residents Concerned for Quality Living v. Seif*, 132 F.3d 925, 927 (3d Cir. 1997). This Court granted the petition for a writ of certiorari in that case, but later vacated the judgment of the court of appeals as moot. *Chester Residents*, ___ U.S. __, 118 S.Ct. 2296 (1998), *vacated as moot*, __ U.S. __, 119 S.Ct. 22 (1998). This case presents the identical, important federal question decided by the Third Circuit in *Chester Residents*. *See* Appendix A, p. 17a (acknowledging that in *Chester Residents*, it "considered the [same] issue before us here, 'whether a pri-

vate right of action exists under discriminatory effect regulations promulgated by federal administrative agencies pursuant to section 602 of Title VI.'").

The Complaint

Plaintiffs' complaint represents a broad-based attack on the entire legislative system for funding public education in the Commonwealth of Pennsylvania based on a single "discriminatory effect" regulation promulgated by the United States Department of Education under Title VI of the Civil Rights Act of 1964. Plaintiffs are the City and School District of Philadelphia, several parents of children attending Philadelphia public schools, several organizations that allegedly provide services that supplement or are ancillary to the educational system in Philadelphia, and several local public officials and entities. Appendix H, pp. 202a-208a, ¶¶ 3-26. Their complaint has two counts. Count I is for violation of "Title VI Implementation Regulations," *i.e.*, 34 C.F.R. §100.3(b), and Count II is for violation of 42 U.S.C. § 1983. Plaintiffs seek a declaration that the defendants' "funding policies and practices" discriminate against minorities and a broadly-worded injunction prohibiting defendants from "continuing to implement a system of funding public schools that discriminates against . . . minority children enrolled in the School District of Philadelphia."

While the complaint principally focuses on the Basic Education Funding ("BEF") element of the funds provided by the Commonwealth to the various school districts,[1] the Court of Appeals read the Complaint to attack both that element and total funding as well. Appendix A, p. 13a and n.2. The complaint alleges that the Commonwealth has a "statutorily established system for funding public school education [that] depends upon a combination of locally generated revenues . . ., state funds. . . , and . . . federal funds." Appendix H, pp. 215a-216a, ¶ 47. Plaintiffs claim that defendants' "policies and practices in [that statutorily established] funding system" lead

1. *See* Appendix H, pp. 215a-217a, ¶¶ 47-49, 51.

to "racial distinctions in the distribution of [all] revenues" and discrimination against "school districts . . . such as Philadelphia with relatively high non-white-enrollment." *Id.*, pp. 219a, 223a, ¶¶ 59-60, 74.

Plaintiffs' complaint does not allege that defendants intentionally discriminated against minorities in making school funding choices or that the school funding system provides less funding statewide to minority students. Rather, plaintiffs claim that the Pennsylvania legislative system results in a disparate impact upon certain school districts in the Commonwealth with large populations of minority students, particularly the School District of Philadelphia. In support of their disparate impact claim, plaintiffs contend that the School District of Philadelphia has special needs that require funding beyond that required by other school districts. These special needs allegedly include severe poverty; persistent racial segregation; low academic performance; and high incidences of support cases, child abuse, juvenile delinquency, births to single mothers, welfare placements, and AFDC placements. Appendix H, pp. 212a-215a, 220a-221a, ¶¶ 37-46, 65. According to the complaint, the funding methods employed by the Commonwealth are insufficient to "meet the needs of a substantial number of its students particularly including its racial and other minority students." *Id.*, pp. 214a-215a, ¶ 45.

Pennsylvania Educational Funding System

Under the Pennsylvania statutory system, as in the vast majority of other states, public education is financed by a combination of state and local funds.

State Funding

The Pennsylvania statutory school funding system, and, in particular, the BEF allocation formula, is set forth in annual legislative enactments.[2] In calculating BEF payments, the Pennsylvania Department of Education ("PDOE") applies the

2. The BEF formula used in a given school year is set forth in a separate statute. *See* 24 P.S. §§ 25-2502.29 (1994/95 school year), 25-2502.31

legislative formula, which employs such factors as the average personal income of the school district, its real property valuation, its school population and its residents' poverty level.[3]

In years prior to 1997-1998, these and other factors were included in the formula, which has generally taken into account the size and age of each school district's student population, its number of low-income students, its local tax effort, and its population density. *See* 24 P.S. §§ 25-2502 to 25-2502.32, reprinted in Appendix E.

In addition to the BEF allocation, school districts also receive substantial additional payments from the Commonwealth, including payments for special education, payments to intermediate units, payments for transportation of non-public school students and payments for social security and retirement subsidies. These payments are based upon various allotments, formulas or factors. *See, e.g.*, 24 P.S. §§ 25-2509.1 (intermediate units), 25-2509.3 (non-public

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NOTES *(continued)*
(1995/96 school year), 25-2502.33 (1996/97 school year), and 25-2502.35 (1997/98 school year), reprinted in Appendix E.

3. The 1997-1998 school year was the most recent school year for which data was available at the time the case was pending in the district court. For the 1997-1998 school year, the Commonwealth paid each qualifying school district a BEF allocation consisting of five parts: (1) a base amount equal to the BEF allocation for the prior school year; (2) a base supplement payable to districts whose 1998-1999 market value/personal income aid ratio is equal to or greater than 0.4000; (3) a growth supplement payable to districts whose average daily membership between the 1996-1997 and 1997-1998 school years; (4) a poverty supplement payable to districts where the number of children in low income families residing in the district for the 1997 calendar year divided by the district's average daily membership for the 1997-1998 school year was greater than or equal to 10%; and (5) a minimum increase calculated by reference to the district's 1998-1999 market value/income aid ratio. *See* 24 P.S. § 25-2502.35, reprinted in Appendix E. In that same school year, the Commonwealth also paid an amount equal to $75.00 multiplied by the school district's average daily membership to each small and poor district which has an average daily membership of 1,500 or less and a market value/income aid ratio of 0.5000 or greater. 24 P.S. § 25-2502.13, reprinted in Appendix E.

school transportation), and 25-2509.5 (special education), 8329 (social security), and 8535 (retirement subsidies), reprinted in Appendix E.

Local Funding

In addition to funding public school education directly through the legislative enactments summarized above, the General Assembly of the Commonwealth also legislatively authorizes local governments to impose local taxes to fund the 501 public school districts in Pennsylvania. 24 P.S. §§ 6-601 to 6-695, reprinted in Appendix E. As the Pennsylvania Supreme Court held in *Danson v. Casey*, 399 A.2d 360, 367 (Pa. 1979), the legislative system for financing public education in Pennsylvania "endorsed the concept of local control to meet diverse local needs and took notice of the right of local communities to utilize local tax revenues to expand educational programs subsidized by the State."

The City and School District of Philadelphia, both plaintiffs in this action, have even greater local flexibility and discretion than Pennsylvania's 500 other school districts in terms of funding Philadelphia public schools. The City adopted home rule, including a 1965 supplement to the City of Philadelphia Home Rule Charter that created the School District of Philadelphia. 351 Pa. Code § 12.12-100, reprinted in Appendix F. Under its home rule powers and the special taxation privileges for public education granted to the City and School District of Philadelphia by the General Assembly, the School District of Philadelphia is authorized to levy not only real estate and net income taxes for public education, but also a special liquor sales tax as well as a realty use and occupancy tax. Philadelphia Municipal Code §§ 19-1801, 1804-1806, reprinted in Appendix G.

The District Court

Plaintiffs' complaint alleges the district court had jurisdiction to hear plaintiffs' case under 28 U.S.C.§1331, 28 U.S.C.§ 1343(a)(3) and (4), and 28 U.S.C.§2201 *et seq.* Appendix H, p. 210a, ¶ 32.

The district court found that a private cause of action existed under section 602 of Title VI, but dismissed the complaint under Rule 12(b)(6) because the plaintiffs had failed to allege a prima facie case of discriminatory impact under *Alexander v. Choate*, 469 U.S. 287 (1985). Appendix B, pp. 52a-54a (citations omitted).

The Court of Appeals

In an opinion dated August 25, 1999, the Third Circuit reversed the district court and remanded the case. It held that although the complaint was not always "precise" or "clear," plaintiffs had stated a claim under a Title VI regulation and 42 U.S.C. § 1983. Appendix A, p. 13a.

The Third Circuit decided three important federal questions that are the subject of this certiorari petition. First, the Third Circuit held that the Department of Education regulation at issue, which purported to restrain conduct having a discriminatory effect on protected classes, did not contravene Congressional intent or create substantive federal law. Second, following its earlier decision in *Chester Residents v. Seif*, the Third Circuit once again decided that Congress intended to create a private right of action under discriminatory effect regulations promulgated by federal administrative agencies pursuant to section 602 of Title VI. In so holding, it acknowledged that this Court had not yet decided this issue. Finally, the court rejected, without discussion, this Court's holding in *Alexander v. Choate*, that broadly-worded regulations could not support a broad-ranging attack on an entire state legislative system in an area in which states traditionally possessed discretion.

A petition for writ of certiorari seeking review of the *Powell* decision was filed by certain defendant-intervenors on September 24, 1999. *Ryan, et al. v. Powell, et al.*, No. 99-527. These intervenors, state senators and representatives, are not federal fund recipients and therefore are not subject to Title VI. They intervened in the district court solely to support defendants.

REASONS FOR GRANTING THE WRIT

I. BY DECIDING THAT A DISCRIMINATORY EFFECT REGULATION PROMULGATED UNDER SECTION 602 OF TITLE VI IS VALID, THE THIRD CIRCUIT INCORRECTLY DECIDED AN IMPORTANT FEDERAL QUESTION THAT THIS COURT SHOULD DECIDE.

This Court should review the important question, which it has never squarely addressed, of whether a federal agency exceeds its rulemaking authority under Section 602 of Title VI by promulgating a regulation which incorporates a discriminatory effect standard, when the statutory authority under which the agency acts reaches only intentional discrimination.[4] While the Third Circuit acknowledged in *Powell* that this Court has "held that Title VI itself did not extend [so] far" as to prohibit disparate impact, Appendix A at 21a, the Third Circuit nonetheless erroneously found that administrative regulations promulgated under Section 602 of Title VI that prohibit disparate impact are valid. Other federal courts, in addition to the Third Circuit, erroneously have assumed that such regulations are valid, and many federal agencies have adopted regulations prohibiting disparate impact discrimination pursuant to Title VI. *See id.* at 9a, (noting that at least forty federal agencies have adopted regulations pursuant to Section 602 prohibiting discriminatory disparate impact and that at least five other federal courts of appeals have found that individual plaintiffs can bring disparate impact claims under Title VI regulations).

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4. This issue was raised below on the Brief of Appellees Jubelier, Ryan, Rhoads and Stairs at 50-52 and the Brief of Appellees at 35-38.

The holdings of *Powell* and other courts ignore the plain language of the statute, are based on a misreading of decisions of this Court, allow federal agencies to engage in improper rulemaking and require that this Court review this important issue. Absent review, federal agencies will continue improperly to promulgate and enforce invalid discriminatory effect regulations, and courts will continue to erroneously approve of such improper lawmaking by allowing claims and affording relief under such regulations.

A. The Statutes and the Regulation

Section 601 of Title VI, 42 U.S.C. § 2000d, provides that:

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

Appendix C, p. 57a. Section 602 of Title VI provides that:

> Each Federal department and agency which is empowered to extend Federal financial assistance to any program or activity...is authorized and directed to effectuate the provisions of Section 2000d [Section 601]...by issuing rules, regulations, or orders of general applicability.

Id. at 57a-58a.

The regulation at issue in this case was promulgated by the Department of Education "in exercising its statutory authority under Section 602" and is codified at 34 C.F.R. § 100.3(b)(2). Appendix A, p. 9a. That regulation prohibits a funding recipient from

> utiliz[ing] criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin, or have the effect of defeating or substantially

> impairing accomplishment of the objectives of the program as respect individuals of a particular race, color, or national origin.

Appendix D (emphasis added).

Neither the Constitution nor the statute giving the Department of Education its rulemaking authority authorize discriminatory effect regulations. The Fourteenth Amendment prohibits only intentional discrimination and does not prohibit conduct resulting in a discriminatory effect. *Washington v. Davis*, 426 U.S. 229 (1976). Title VI, the underlying statutory authority pursuant to which the Department of Education acted in promulgating the regulation at issue, extends no further than the Fourteenth Amendment; thus, Title VI itself does not prohibit instances of discriminatory effect. *U.S. v. Fordice*, 505 U.S. 717, 732 n.7 (1992); *Guardians Ass'n v. Civil Service Com'n of City of New York*, 463 U.S. 582, 608 n.1 (1983) (Powell, J, concurring); *Regents of Univ. of California v. Bakke*, 438 U.S. 265, 284-87 (1978). Indeed, as the Third Circuit acknowledged in *Powell*, this Court has held that Section 601 of Title VI "prohibits *only* intentional discrimination." Appendix A, pp. 8a-9a (emphasis added) (citing *Guardians*).

B. The Misreading Of This Court's Precedents

In its vacated *Chester Residents* opinion, the Third Circuit noted that "[h]idden within the Court's statement [in *Fordice*] may be an indication that implementing regulations...that incorporate a discriminatory effect standard are invalid, because they extend further than the Fourteenth Amendment." *Chester Residents*, 132 F.3d at 931 n.9. However, as in *Chester Residents*, the Third Circuit in *Powell* ignored *Fordice* and instead misread *Guardians* and *Alexander v. Choate*, 469 U.S. 287 (1985) as holding that administrative regulations incorporating a disparate impact standard are valid. Appendix A, pp. 21a-22a.

Justice Powell correctly predicted that the opinions in *Guardians* "will further confuse rather than guide." *Guard-*

ians, 463 U.S. at 608 (Powell, J., concurring). Reviewing the important question of whether a federal agency exceeds its Section 602 rulemaking authority in promulgating discriminatory effect regulations will end the confusion. The Third Circuit and other courts are confused as to the holding of *Guardians*. For example the *Powell* panel stated that "five of the nine justices [in *Guardians*] *agreed* that the administrative regulations incorporating a disparate impact standard are valid." Appendix A, p. 21a (emphasis added). An examination of the *Guardians* opinion, however, reveals that no opinion garnered a majority. *See Alexander*, 469 U.S. at 293. Moreover, comments by Justices White, Blackmun, Brennan, Stevens and Marshall, four of whom wrote in dissent, regarding validity of discriminatory effect regulations were dicta[5] and did not impact the Court's holding that affirmed the Second Circuit's determination that the plaintiffs were limited to noncompensatory prospective relief under Title VI and its regulations. Thus, the issue in Guardians was whether there is a cause of action for compensatory damages for allegations of discriminatory effect under either Title VI or agency regulations. The Court held that there is no such cause of action. The Court did not "hold" that discriminatory effect regulations are valid.

Moreover, four justices in *Guardians*, each of whom concurred in the judgment, stated to the contrary – that discriminatory effect regulations are *not* a valid exercise of agency authority.[6] *Guardians*, 463 U.S. at 611, n.5 (Powell, J., concur-

5. Indeed, in *Bakke*, Justices Brennan, White and Marshall agreed that "[n]owhere is there any suggestion that Title VI was intended to terminate federal funding for any reason other than consideration of race or national origin by the recipient institution in an manner inconsistent with the standards incorporated in the Constitution." *Bakke*, 438 U.S. at 332. As Justice Powell pointed out in *Guardians*, "[i]f nowhere' is there any evidence that Congress intended the Title VI standard to differ from the constitutional standard, clearly an agencyn interpretation to the contrary is entitled to no deference." *Guardians*, 463 U.S. at 611 n.5 (Powell, J., concurring).

6. The concurring Justices noted that to the extent this Court tacitly approved liability under Title VI for conduct having only a discriminatory impact in *Lau v. Nichols*, 414 U.S. 563 (1974), that holding was incorrect and was impliedly overruled by the Court in *Bakke*, *Guardians*, 463 U.S. at 611

ring in judgment and joined by Burger, C.J.); *id.* at 612 (Rehnquist, *J., concurring in judgment* and joining Part II of Powell's opinion); *id.* at 614-15 (O'Connor, J., concurring in judgment). For example, Justice Powell stated that "[a]dministrative agencies do not have - and should not have - such lawmaking power." Id. at 611 n.5. Justice O'Connor reasoned that, since proof of purposeful discrimination is a necessary element of a valid Title VI claim, "*regulations imposing an impact standard are not valid.*" *Guardians*, 463 U.S. at 612 (O'Connor, J., concurring) (emphasis added). Justice O'Connor further stated that:

> ...it is difficult to fathom how the Court could uphold administrative regulations that would proscribe conduct by the recipient having only a discriminatory effect. Such regulations do not simply "further" the purpose of Title VI; they go well beyond that purpose.

Guardians, 463 U.S. at 613 (O'Connor, J., concurring).

The Third Circuit's reliance upon *Alexander* is similarly misguided and further demonstrates the confusion in the federal courts of appeals necessitating review by this Court. In *Alexander*, plaintiffs, Medicaid recipients, challenged the state's reduction in the number of inpatient hospital days for which the state's Medicaid program would pay, claiming the reduction had a discriminatory effect on the handicapped and violated the Rehabilitation Act and its implementing regulations. This Court held that such claims were not cognizable under that Act or its regulations. In addition, Justice Marshall's incorrect characterization of *Guardians*, which the Third Circuit offered in support of its decision, was pure dicta and did not relate to the resolution of *Alexander*. The holding of *Alexander*, that the plaintiffs had not established a prima facie violation of Section 504 of the Rehabilitation Act, did

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NOTES *(Continued)*

n.4 (Powell, J., concurring in judgment and joined by Burger, C.J. and Rehnquist, J.) and 463 U.S. at 615 (O'Connor, J., concurring in judgment).

not involve the issue of whether discriminatory effect regulations thereunder are valid; and, therefore, the Third Circuit improperly relied on the case.

C. Improper Agency Rulemaking

Administrative agencies should not be permitted to continue to usurp the power of Congress and effectively create substantive law through regulations which exceed the specific reach of Title VI's prohibitions.

In *Powell*, the Third Circuit found discriminatory effect regulations to be valid despite recognizing that such regulations "go further than [the] statute." Appendix A, p. 22a. As this Court pointed out in *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, *rehearing denied*, 425 U.S. 986 (1976):

> [T]he rulemaking power granted to an administrative agency charged with the administration of a federal statute is *not the power to make law*. Rather, it is "the power to adopt regulations to carry into effect the will of Congress as expressed by the statute."

425 U.S. at 213-14 (emphasis added).

There is nothing in the language of Title VI to suggest an intent or "will of Congress" to reach anything other than intentional discrimination. As Justice O'Connor opined in *Guardians*, a discriminatory effect regulation exceeds statutory authority because the language and history of the statute, as well as the Supreme Court's application of it, dictate a proscription of only intentional discrimination. Justice O'Connor reasoned as follows:

> An administrative agency is itself a creature of statute. Although the Court has stated that an agency's legislative regulations will be upheld if they are "reasonably related" to the purposes of the enabling statute, Mourning v. Family Publications Service, Inc., 411 U.S. 356, 369 (1973), we would expand considerably the discretion and power of agencies were we to

> interpret "reasonably related" to permit agencies to proscribe conduct that Congress did not intend to prohibit. "Reasonably related to" simply cannot mean "inconsistent with." Yet that would be the effect of upholding the administrative regulations at issue in this case if, as five Justices concluded in Bakke, the expressed will of Congress is that federal funds recipients are prohibited only from purposefully discriminating on the grounds of race, color, or national origin in the administration of funded programs.

Guardians, 463 U.S. at 614 (O'Connor, J., concurring).

In promulgating discriminatory effect regulations, federal agencies such as the Department of Education have outlawed otherwise lawful conduct and thereby have made fundamental policy determinations that are for Congress to make. If the "will of Congress" to which Justice O'Connor referred in *Guardians* were to prohibit disparate impact, then Congress would have so provided. It did not. This policy choice cannot and should not be usurped by administrative agencies. *See Industrial Union Dep't, AFL-CIO v. Am. Petroleum Institute*, 448 U.S. 607, 685-86 (1980) (Rehnquist, J., concurring) (noting that nondelegation doctrine ensures that important social policies are made by Congress).

This Court should grant review of the Third Circuit's decision in order to correct a serious error in the interpretation and application of Title VI and this Court's precedents.

II. EVEN IF THE REGULATION AT ISSUE, WHICH INCORPORATES A DISPARATE IMPACT STANDARD UNDER TITLE VI, IS VALID, THE COURT SHOULD DECIDE THE IMPORTANT QUESTION OF WHETHER A PRIVATE RIGHT OF ACTION EXISTS TO ENFORCE DISCRIMINATORY EFFECT REGULATIONS

Assuming a regulation which incorporates a disparate impact standard were valid, an additional important question is whether a private right of action exists to enforce such a regulation. This Court should decide whether a private right of action exists under discriminatory effect regulations promulgated by federal administrative agencies pursuant to Section 602 of Title VI for two principal reasons. First, this Court granted certiorari on this issue in *Chester Residents*, but never reached the issue because the underlying judgment was vacated as moot.[7] Thus, this important question remains undecided. Appendix A, p. 17a. Second, the Third Circuit's resolution of the issue completely undermines the Title VI enforcement scheme intended by Congress. Given the proliferation of discriminatory effect regulations, the *Powell* decision is destined to have far-reaching implications for the entire federal system that were never authorized by Congress. For these reasons and the reasons discussed more fully herein, the Court should grant review of this important issue.

A. The Impact of *Powell* is Far-Reaching

Many federal agencies have adopted regulations prohibiting disparate impact discrimination pursuant to Title VI and various courts have assumed, without directly deciding the issue, that there is a private right of action to enforce those regulations. *See, e.g., Castenada by Castenada v. Pickard*, 781 F.2d 456 (5th Cir. 1986); *Buchanan v. City of Bolivar, Tenn.*, 99

7. On June 8, 1998, this Court granted the Petition for Writ of Certiorari in *Chester Residents* on this very issue, but on August 17, 1998 vacated the judgment of the Court of Appeals as moot. In *Powell*, the Third Circuit relied upon its analysis in *Chester Residents* in finding that a private right of action exists under discriminatory effect regulations.

F.3d 1352 (6th Cir. 1996); *David K. v. Lane*, 839 F.2d 1265 (7th Cir. 1988); *Larry P. v. Riles*, 793 F.2d 969 (9th Cir. 1984); *Villaneuva v. Carere*, 85 F.3d 481 (10th Cir. 1996); *Georgia State Conference of Branches of NAACP v. Georgia*, 775 F.2d 1403 (11th Cir. 1985); *African Am. Legal Defense Fund, Inc. v. N.Y. State Dep't of Educ.*, 8 F.Supp.2d 330 (S.D.N.Y. 1998); *Campaign for Fiscal Equity, Inc. v. New York*, 655 N.E.2d 661 (N.Y. 1995).[8] However, the Third Circuit's decision in *Powell* is the only federal court of appeals decision to expressly hold that a private right of action exists to enforce disparate impact regulations under Section 602. This decision reopens the invitation, initially issued by the Third Circuit in *Chester Residents*, to federal litigation by private parties against state or local government agencies which receive federal funds. Under the Third Circuit's construction of Title VI, any person or entity displeased with treatment by a state or local agency can simply bypass the federal agency process set up by Congress and seek direct federal court redress for violations of agency regulations.

As discussed in detail below, such a scheme is completely at odds with the system set up by Congress to address discrimination by entities receiving federal funds. The Third Circuit's improper finding of a private right of action to enforce agency regulations promulgated under Section 602 will, contrary to the intent of Congress, require federal courts to become enforcers of regulations without the benefit of the administrative framework that Congress designed to deal with such regulations. Federal courts do not have the expertise to do so, Congress did not intend them to do so, and they should not be forced to do so by an improper ruling of a federal court of appeals. The implications of this decision are wide ranging and will impact all state and local governments, thereby warranting this Court's immediate review.

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8. At least one district court has determined that disparate impact regulations cannot support a private action. *New York City Environmental Justice Alliance v. Giuliani*, 50 F. Supp 2d 250 (S.D.N.Y. 1999).

B. This Court Granted Certiorari On The Same Issue In *Chester Residents*

On June 8, 1998, this Court granted certiorari in *Chester Residents*. *Chester Residents*, 118 S.Ct. 2296. The petition upon which certiorari was granted in *Chester Residents*, like the petition here, requested this Court to decide whether Congress intended to create a private cause of action under Section 602 of Title VI in favor of any person or entity which alleged a discriminatory effect in the administration of programs and activities of a federally funded state or local agency. Thus, *Chester Residents* and *Powell* present identical issues. As the Third Circuit noted in *Powell*:

> In *Chester Residents*, 132 F.3d at 927, a decision that has since been vacated as moot, this Court considered the issue before us here, "whether a private right of action exists under discriminatory effect regulations promulgated by federal administrative agencies pursuant to Section 602 of Title VI."

Appendix A, p. 17a. The *Powell* court went on to note that "...the Supreme Court never directly addressed the issue" and that the Third Circuit has "...found no direct authority confirming or denying a private right of action under the Title VI regulation." *Id.* This issue is still as important today as it was a year ago when this Court granted certiorari in *Chester Residents* and is an issue this Court would have reached in *Chester Residents* had that action not been rendered moot.

C. The Third Circuit Improperly Interpreted Section 602

Review by this Court is necessary to ensure that the administrative system set up by Congress for addressing discrimination by federal funds recipients is not rendered meaningless by judicial activism. In *Powell*, the Third Circuit applied its analysis from *Angelastro v. Prudential-Bache Securities, Inc.*, 764 F.2d 939 (3d Cir. 1985) to determine that there is an implied private right of action to enforce discriminatory effect regulations promulgated by federal administrative agencies pursuant to Section 602. Appendix A, pp. 16a-20a. The

Third Circuit applied these factors in a manner that improperly read Section 602 of Title VI by creating a private right of action where none was intended.

The *Angelastro* analysis asks: (1) whether a private right of action exists under the statute under which the regulation was promulgated; (2) whether the agency regulation is properly within the scope of the enabling statute[9]; and (3) whether implying a private right of action will further the purposes of the enabling statute. Appendix A, pp. 17a-18a.

1. The Statutory Language and Structure Evidences Congress' Intent Not to Provide for a Private Right of Action to Enforce Regulations Promulgated Under Section 602

The Third Circuit incorrectly resolved the first prong of the *Angelastro* test and in so doing improperly supplanted the administrative scheme established by Congress. In *Chester Residents*, the Third Circuit applied this Court's analysis in *Cort v. Ash*, 422 U.S. 66 (1975) to Section 602 of Title VI in resolving the first prong of the *Angelastro* analysis.[10] In *Powell*, the Third Circuit dismissed such a resolution of the first *Angelastro* factor as "circuitous." Appendix A, p. 19a.

Instead, the Court reasoned that although the rule [34 C.F.R. § 100.3(b)(2)] was promulgated under Section 602, that section "implements" Section 601, and since Section 601 of Title VI gives rise to an implied right of action to enforce intentional violations of Title VI, regulations under Section 602, which are promulgated to "effectuate" the provisions of

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9. Because the discriminatory effect regulation at issue is not within the scope of the enabling statute, the second prong of the *Angelastro* analysis is not met. *See* supra at Section I.

10. The *Cort* analysis asks (1) is the plaintiff one of the class for whose especial benefit the statute was enacted; (2) is there any indication of congressional intent to deny or create a private remedy; (3) is the implication of a private remedy consistent with the purposes of the legislative scheme and (4) is the cause of action traditionally relegated to state law. *Cort*, 422 U.S. at 78. The second question regarding Congressional intent is the "ultimate issue". *Touche Ross & Co. v. Redington*, 422 U.S. 560, 575-76 (1979).

Section 601, also must give rise to a private right of action. Appendix A, p. 20a. This transitive reasoning essentially eviscerates Section 602 by transplanting the implied right of action for intentional discrimination under Section 601 into discriminatory effect regulations under Section 602, despite the fact that the plain statutory text, congressional intent and applicable precedents are to the contrary.

The plain language of Section 602 indicates that no private right of action was intended. In determining congressional intent, the starting point is always the language of the statute. *Touche Ross & Co. v. Redington*, 442 U.S. 560, 575-76 (1979); *Ernst & Ernst*, 425 U.S. at 197, 200-01. The language and structure of Section 602 do not create any privately enforceable rights and, indeed, do not create any substantive rights at all. Rather, Section 602 directs agencies that provide federal funding to issue rules, regulations and orders of general applicability to effectuate the provisions of Section 601. Appendix C, p. 57a. Limitations on such agency regulations include consistency with the purposes of the statute authorizing federal financial assistance and approval by the President. *Id.* Section 602 authorizes federal agencies to enforce their regulations through termination or denial of federal funds or by any other means authorized by law. *Id.*[11] No action, however, can be taken to enforce regulations under Section 602

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11. The only remedy expressly provided by Section 602 is the termination of federal funding by the promulgating agency. On enforcement Section 602 provides:

> *Compliance with any requirement adopted pursuant to this section may be effected (1) by the termination of or refusal to grant or to continue assistance* under such program or activity to any recipient as to whom there has been an express finding on the record, after opportunity for hearing, of a failure to comply with such requirement, but such termination or refusal shall be limited to the particular political entity, or part thereof, or other recipient as to whom such a finding has been made, and, shall be limited in its effect to the particular program, or part thereof, in which such non-compliance has been so found, *or* (2) *by any other means authorized by law;*

Appendix C, pp. 57a-58a (emphasis added).

until the agency has determined that a regulation has been violated, informed the recipient of federal funds of its failure to comply with the regulation and determined that it is not possible to obtain voluntary compliance with the regulation.[12]

Thus, the congressional intent in Section 602 is plain on the face of the statute — Congress intended that federal agencies, not private plaintiffs, enforce regulations promulgated under Section 602. In light of this detailed structure which provides for enforcement by the federal government, not private plaintiffs, "it is highly improbable that 'Congress absentmindedly forgot to mention an intended private action.'" *Transamerica Mortgage Advisors v. Lewis*, 444 U.S. 11, 20 (1979). Where, as here, a "statute's language is plain, 'the sole function of the courts is to enforce it according to its terms.'" *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241 (1989). When the court finds "the terms of a statute unambiguous, judicial inquiry is complete, except in 'rare and exceptional cases.'" *Garcia v. United States*, 469 U.S. 70, 75 (1984), rehearing den., 469 U.S. 1230 (1985). *See* Appendix A, p. 18a ("If under *Cort v. Ash* and its progeny, a court finds that Congress did not intend the statute to be enforced by private actions, then the inquiry is concluded."). The language of the

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12. Any enforcement of Section 602 regulations is restricted as follows:

> *Provided, however,*
> That no such action shall be taken until the department or agency concerned has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means. In the case of any action terminating, or refusing to grant or continue, assistance because of failure to comply with a requirement imposed pursuant to this section, the head of the Federal department or agency shall file with the committees of the House and Senate having legislative jurisdiction over the program or activity involved a full written report of the circumstances and the grounds for such action. No such action shall become effective until thirty days have elapsed after the filing of such report.

Appendix C, p. 58a (emphasis in statute).

statute should have concluded the inquiry against the existence of a private right of action to enforce agency regulations under Title VI. It did not. Thus, the Third Circuit's decision should be reviewed by this Court because, in holding a private right of action exists under Section 602 regulations, the Third Circuit improperly eliminated procedures put in place by Congress.

Moreover, a private right of action to enforce agency regulations undermines the purposes of Section 602; and, thus, the third prong of the *Angelastro* analysis also is not met. Congress decided to effect enforcement of Title VI at the administrative level through agency procedures. A private right of action under Title VI regulations would allow a private plaintiff to use the tools provided by Congress to bring about compliance with Title VI regulations without any regard for the congressional preconditions and safeguards created for the use of those tools. Enforcement of agency regulations should be left to the expertise, judgment and special procedures promulgated by the agency at issue, in this case the Department of Education. The Third Circuit erroneously reasoned that a private right of action will increase enforcement and that "...such increased enforcement will further Title VI's purposes, compensating for the agency's lack of sufficient resources to adequately enforce the regulation itself." Appendix A, p. 18a.

In so holding, the Third Circuit acknowledged that it was displacing Congress' intent to have the agency enforce the regulations at issue with the Court's will that private parties do so. The Court second-guessed Congress' policy decision and imposed its own. This undermines the congressional goal of providing preconditions and safeguards on the enforcement of expansive discriminatory effect regulations and defeats, rather than furthers, the purpose of the enabling statute.

2. This Court's Precedents Suggest There Is No Private Right Of Action To Enforce Title VI Regulations

As the Third Circuit noted in *Powell*, this Court has never directly addressed the important question of whether a private right of action exists to enforce discriminatory effect regulations. Appendix A, p. 17a. In *Guardians*, no interpretation of Title VI with respect to the issue obtained a majority of the court. Thus, the Third Circuit was without direct guidance as to whether private plaintiffs can maintain an action against a state agency based upon the discriminatory effect regulations of the Department of Education.

However, this Court has suggested that no private right of action exists to enforce Title VI regulations. In acknowledging the administrative structure established by Congress in Title VI, this Court in *Alexander* commented on its *Guardians* opinion as follows:

> In essence, then, we held that *Title VI had delegated to the agencies in the first instance the complex determination* of what sorts of disparate impacts upon minorities constituted sufficiently significant social problems, and were readily enough remediable, to warrant altering the practices of the federal grantees that had produced those impacts.

Alexander, 469 U.S. at 294 (emphasis added).

Finally, as noted herein, this Court has found that Title VI itself prohibits only intentional discrimination and, by implication, authorizes a private right of action for violations of the statute. Such implied actions are "limited by the discriminatory intent standard required to prove violations of Title VI." *Guardians*, 463 U.S. at 608 n.1 (Opinion of Powell, J.); *see Fordice*, 505 U.S. at 732 n.7 (noting that Title VI's protection extends no further than the Fourteenth Amendment).

Thus, it is clear from the plain text of Section 602 and this Court's precedents that Congress "delegated to the agencies in the first instance" the enforcement of agency regulations and

that it did not intend for there to be a right of action under which private plaintiffs could assert alleged violations of Title VI regulations.

III. BY APPROVING THE USE OF A GENERALLY WORDED REGULATION PROMULGATED BY THE DEPARTMENT OF EDUCATION UNDER TITLE VI AS A VEHICLE FOR ATTACKING THE COMMONWEALTH OF PENNSYLVANIA LEGISLATIVE SYSTEM FOR FUNDING PUBLIC EDUCATION, THE THIRD CIRCUIT HAS DECIDED AN IMPORTANT FEDERAL QUESTION IN A WAY WHICH CONFLICTS WITH THIS COURT'S DECISION IN *ALEXANDER V. CHOATE*

As the Third Circuit recognized, this action challenges under a single, generally worded regulation of the United States Department of Education the entire legislative system of the Commonwealth of Pennsylvania for funding public education, claiming that it has a racially discriminatory effect. Appendix A, pp. 6a, 9a. Since the Pennsylvania system is the same or similar to that of other states, authorization of attacks on that system under a generally worded regulation encourages such attacks in other states, as has already occurred in New York and Arizona.[13] As this Court noted of similar attacks on public education funding systems in *San Antonio Independent School District v. Rodriguez:*

> ...it would be difficult to imagine a case having a greater potential impact on our federal system than the one now before us, in which we are urged to abrogate systems of financing public education presently in existence in virtually every State.

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13. This action is the fourth reported case utilizing the Title VI regulation to attack a state legislative public school funding system. *See Campaign For Fiscal Equity, Inc. v. New York*, 655 N.E.2d 661, 669-671 (N.Y. 1995); *African American Legal Defense Fund, Inc. v. New York State Department of Education*, 8 F.Supp.2d 330, 337-339 (S.D.N.Y. 1998); *Flores v. State of Arizona*, 48 F.Supp.2d 937, 939, 953-954 (D. Ariz. 1999).

441 U.S. 1, 44, *rehearing den.*, 411 U.S. 959 (1973).

The regulation which forms the basis for this suit was promulgated by the Department of Education under Section 602 of Title VI of the Civil Rights Act of 1964. It prohibits a recipient of federal educational funds from "utiliz[ing] criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin, or have the effect of defeating or substantially impairing accomplishment of the program as respects individuals of a particular race, color, or national origin." Appendix D.

This regulation of the Department of Education closely mirrors a regulation promulgated under Section 504 of the Rehabilitation Act of 1973, which was before this Court in *Alexander v. Choate*, 469 U.S. 287 (1985). In *Alexander*, after noting its agreement with the petitioner's premise that Section 504 was modeled in part on Title VI, 469 U.S. at 293 n.7, this Court unanimously held that the regulations relied upon by Medicaid recipients in that case to challenge the State of Tennessee's reduction of the number of covered annual days of in-patient hospital care "do not in fact support respondents' action," 469 U.S. at 294 n.10, and that "generally worded regulations" are insufficient to support broad-based attacks upon state legislative actions in areas of traditional state discretion. This Court specifically concluded that:

> Before we would find that these generally worded regulations were intended to limit a State's long-standing discretion to set otherwise reasonable Medicaid coverage rules, that intent would have to be indicated with greater specificity in the regulations themselves or through other agency action.

469 U.S. at 307 n.32.

Alexander involved several generally worded regulations, one of which was virtually identical to the single regulation

relied upon as the basis for this action.[14] Moreover, just as the State of Tennessee was recognized by this Court to have "longstanding discretion to set otherwise reasonable Medicaid coverage rules," 469 U.S. at 307 n.32, so too here sovereign states, such as the Commonwealth of Pennsylvania, have long been recognized to have discretion in the area of establishing a system for funding their public schools. As this Court stated in *Rodriguez*, public school funding is "an area in which [this Court] has traditionally deferred to state legislatures," specifically noting that the Court "lack[s] both the expertise and the familiarity with local problems so necessary to the making of wise decisions with respect to the raising and disposition of public revenues," as it relates to state public school funding issues. 411 U.S. at 40, 41.[15] Indeed, this Court concluded in *Rodriguez* that:

> The consideration and initiation of fundamental reforms with respect to state taxation and education are matters reserved for the legislative processes of the various States, and we do no violence to the values of federalism and separation of powers by staying our hand.

Id. at 58.

The approach taken by this Court in *Alexander* and *Rodriguez* is consistent with its longstanding recognition that the

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14. *See Alexander*, 469 U.S. at 304-305 (noting that one of the regulations relied upon prohibited "a recipient of federal funding from adopting 'criteria or methods of administration that have the purpose or effect of defeating or substantially impairing accomplishment of the objectives of the recipient's program with respect to the handicapped.'")

15. The importance of public school funding to the sovereign interests of the Commonwealth of Pennsylvania is made even more manifest by the Pennsylvania Constitution, which mandates the General Assembly to provide for a "thorough and efficient system of public education" in the Commonwealth. Pa.Const. Article III, § 14. *See Marrero v. Commonwealth*, 709 A.2d 956 (Pa. Cmwlth.), *appeal pending*, No. 0032 M.D. Appeal Dkt. 1998 (Pa. 1998).

States "retain substantial sovereign authority under our constitutional system." *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991). Federal courts have, therefore, been enjoined by this Court to be certain of Congress' intent before finding that federal law overrides the constitutional balance between the federal and state governments. *Id.* at 460. This Court has further held that "Congress should make its intention 'clear and manifest' if it intends to pre-empt the historic powers of the States," since "the requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision." *Id.* at 461.

While Petitioners raised this issue as their first point in arguing for affirmance of the district court's dismissal of the complaint in their appellate brief in the Third Circuit, the Court of Appeals simply ignored this fundamental issue of whether the regulation which formed the sole basis for this suit could support this action, and did not address it in its opinion.

The wisdom of *Alexander's* recognition that "generally worded regulations" are insufficient to evince a determination that matters traditionally committed to the States have been taken away from them is demonstrated by the United States' Amicus Brief in the district court in this action. That brief suggested that a federal court, under the generally worded regulation relied upon in the complaint, "may" be able to rewrite state school funding legislation based upon "the demands on social services in addition to education on an urban area's tax base, the 'buying power' of the education dollar in an urban school district, or the special education and physical plant needs that must be addressed in such a district." Appendix I.

The generally worded regulation relied upon in the complaint gives no basis for a federal court reasonably to conclude that Congress meant to vest it with the power to rewrite a state's legislative system for public school funding in favor of certain urban school districts based upon such factors. As

detailed above, the Pennsylvania public school funding formula provides for both local and state funds, and considers many factors. For the state BEF component, these include school district wealth (measured by market value of real estate and personal income), school district residents' poverty and student population growth. Additional funding is granted under the state formula to school districts such as Philadelphia where the poverty rate is high or where student population has increased. Additional funding is also granted to poor and small districts. For the local component, the local taxing authorities and school districts (including the City of Philadelphia, a Plaintiff in this action) are free to impose such taxes for public education as are felt desirable at the local level to provide appropriate educational opportunities.

Moreover, the use of federal regulations to rewrite a legislatively-created mechanism for raising tax revenues in support of local school districts raises serious federalism concerns. Plaintiffs' allegations of disparities in total revenues represent an attack on the local funding component of Pennsylvania's entire system of funding its schools. By permitting all of plaintiffs' claims to go forward, the Third Circuit's decision not only authorizes an attack on the legislative formula that allocates state funds, but also sanctions a challenge to the fundamental premise of the funding system: that state funds are to be combined with local and other revenues to finance public education. Appendix A, p. 13a, n.2; and *id.* at pp. 16a, 22a; *see also Danson*, 399 A.2d at 367 (quoted *supra* at 7). Under the Third Circuit's reasoning, plaintiffs may use a generally-worded regulation not only to attack the allocation of state monies, but also to attempt to dismantle the system of local control over school funding. One of the plaintiffs, the School District of Philadelphia, could use such federal regulations to escape completely its obligation to raise local revenues to support its schools, instead thrusting this responsibility completely onto the state. Such a result threatens to turn the federalist system on its head.

Permitting a federal court to enjoin further use of Pennsylvania's multifactor funding formula, which weighs competing interests with which courts are institutionally unfamiliar, and which is based on both local and statewide legislative enactments, eviscerates *Alexander* and is inconsistent with the teachings of *Gregory*. For this reason, and because this precedent encourages additional unfounded attacks on other state public school funding systems, this Court should grant certiorari to review this important federal question under Title VI.

CONCLUSION

For each of the foregoing reasons, petitioners respectfully request that this Court grant their petition for writ of certiorari to the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

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